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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners*,

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CHISLIN,
Jonesville, Virginia.

M. E. BOLARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia,
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners' Reply to the Brief in Opposition noted a rehearing petition was filed in *Lewis* v. *Mears*, DC, Pa., 189 Fed. Sup. 503, aff'd. 3 Cir., F.2d , 48 LRRM 3120, and was then still pending. On January 4, 1962, the Third Circuit *en banc* (8 Circuit Judges participating), *being equally divided*, denied the rehearing petition, noting, "There is not a majority of

the Court in favor of granting the petition for rehearing." However, in a dissenting opinion, Chief Judge Biggs declared the district court and the Third Circuit[1] "erred in holding that the terms of that Agreement might be nullified by an alleged oral prior or contemporaneous understanding that the terms of the Agreement should not be valid until it was delivered back to Mears."

The dissenting opinion notes that Circuit Judges Staley, Ganey and Smith "join in the views expressed in this opinion."

The dissenting Justices agree with Judge Sobeloff's dissent in *Lowry* (which is the subject of the instant petition for certiorari) that "the position taken by the majority emasculates the policy intended to be created by Congress in enacting Section 302(c)(5)(B) and vitiates the spirit of Section 8(d) of the Labor Management Relations Act".

Pointing to this Court's *Benedict* (361 U.S. 459, 470), the dissenting jurists declared "the federal courts in fashioning a body of federal common law for the enforcement of collective bargaining agreements * * * must shape that law so that such agreements cannot be modified or nullified by covert conditions or stipulations entered into between the employer and the union" and that "otherwise industrial strife is sure to ensue and the stabilizing effect on labor relations of the Labor Management Relations Act will be destroyed."[2]

The sharp division of opinion among the Third Circuit's members and the lack of a majority vote therein

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[1] Circuit Judges Goodrich, McLaughlin and Kalodner participated in the original hearing.

[2] The Per Curiam and dissenting opinions appear in Appendix A herein.

on the legal principle involved adds to the already existing conflict between the majority view in *Lowry* and the decisions of this Court, the Sixth Circuit and the Fourth Circuit's *Mearns* case, and the confusion in the Fourth Circuit, as pointed out in the petition for certiorari herein (pp. 12, 16-17). The Third Circuit's action on the rehearing petition in *Mearns* and the dissent above quoted emphasize the importance of this Court's settling the conflict, the confusion and the uncertainty existing on the question presented to this Court herein by its awarding the petition for certiorari.

Respectfully submitted,

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia,

Attorneys for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,502

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND, *Appellants*

v.

EDWARD MEARS, Individually and Trading as MEARS COAL COMPANY

Opinion Sur Petition for Rehearing

(Filed January 4, 1962)

Present: BIGGS, *Chief Judge*, GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY AND SMITH, *Circuit Judges*

PER CURIAM

There is not a majority of the Court in favor of granting the petition for rehearing. Accordingly the petition will be denied.

BIGGS, *Chief Judge*, dissenting.

Putting to one side any contention that Mears ratified the 1952 National Bituminous Coal Wage Agreement, that he is estopped to deny that he was bound by it, or that the parole evidence rule was violated, the court below and this court erred in holding that the terms of that Agreement might be nullified by an alleged oral prior or contemporaneous understanding that the terms of the Agreement should not be valid until it was delivered back to Mears. The royalty payments provided for by the Agreement were "really another form of compensation to the employees". Lewis v. Benedict Coal Corp., 361 U.S. 459, 469 (1960).

As Chief Judge Sobeloff points out in his dissenting opinion in Lewis, Trustee, et al. v. Lowry, 295 F.2d 197 (4 Cir. 1961), the position taken by the majority emasculates the policy intended to be created by Congress in enacting Section 302(c)(5)(B) and vitiates the spirit of Section 8(d) of the Labor Management Relations Act, 29 U.S.C.A. § 186 (c)(5)(B) (Supp. 1960) and § 158(d). The federal courts in fashioning a body of federal common law for the enforcement of collective bargaining agreements, Lewis v. Benedict Coal Corp., *supra*, p. 470, must shape that law so that such agreements cannot be modified or nullified by covert conditions or stipulations entered into between the employer and the union. If it be otherwise industrial strife is sure to ensue and the stabilizing effect on labor relations of the Labor Management Relations Act will be destroyed.

For this reason I dissent from the order of this court denying rehearing en banc.

I am authorized to state that Judge Staley, Judge Ganey and Judge Smith join in the views expressed in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

PETITION FOR REHEARING

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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VAL J. MITCH,
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T. G. DUDLEY,
907 Fifteenth Street, N. W.
Washington 5, D. C.

CLYDE Y. CHERLIN,
Jonesville, Virginia.

M. E. BUZZARDE,
511 Kanawha Valley Building,
Charleston, West Virginia,

Attorneys for Petitioners.

[illegible], D. C.

IN THE

Supreme Court of the United States

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JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,
Petitioners,

v.

F. ARNOLD LOWRY, Individually, and Trading as LOWRY COAL COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950,[1] pray that this Court grant rehearing of its

[1] Herein called "Fund". "Petitioners" are also called "Trustees" herein.

order of January 22, 1962, denying the petition for writ of certiorari (U.S.), and in which order Chief Justice Warren, Mr. Justice Black and Mr. Justice Brennan noted they would grant the writ, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed herein on November 24, 1961.

REASON FOR GRANTING REHEARING

Though the petition for certiorari directed attention to a list of *decided* cases collated in Chief Judge Sobeloff's dissenting opinion in which other employers sought "to renege on their agreed-upon obligations with respect to" payments to the Fund,[2] Petitioners did not therein call the Court's attention that there are *currently pending* in federal district courts of West Virginia, of Kentucky and of Tennessee thirty-six cases (in addition to the instant *Lowry* case) wherein employers have asserted the "sham contract" defense against Petitioners' claims for delinquent royalties of almost $900,000.00.[3]

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[2] See Appendix to the Petition for Certiorari, p. 7a, for such cases.

[3] The pending cases are as follows:

Name of Company	Amount
George A. Bryant & Sons Coal Co.	$ 19,946.01
E. Dick Burrow Coal Co.	23,560.00
Willis Flynn Coal Co.	21,350.48
Howard Higgins Coal Co.	12,452.15
R. B. Ivey Coal Co.	23,082.22
Will Land Coal Co and or Will Land & Sons Coal Co.	12,302.90
Charlie Martin Coal Co.	33,526.03
Patrick & Hampton Coal Co.	22,457.30

Heretofore certiorari was awarded "*because determination of the issue raised here will guide adjustment of a large body of similar claims now pending*" in *Alcoa S.S. Co., Inc. v. U. S.*, 338 U.S. 421, 423.[4] More recently, the Court granted certiorari in *Local*

Name of Company	Amount
Earl Patton Coal Co.	11,741.34
Hampton E. Patton Coal Co.	18,442.61
James Patton Coal Co.	36,564.30
J. W. Sanders Coal Co. and J. W. Sanders & Sons Coal Co.	6,124.48
J. A. Cordell Coal Co. and/or Cordell Coal & Constr. Co.	11,170.72
H. A. Daffron Coal Co.	13,692.71
M. T. Dixon Coal Co.	16,345.40
J. H. Graham Coal Co.	12,948.80
M. & T. Coal Co.	35,898.15
Marshall Meeks Coal Co.	46,113.36
W. T. Morrison Coal Co.	21,494.40
Hershel Myers Coal Co.	15,170.12
Waldo Myers Coal Co.	11,757.30
Edward Nunley Coal Co.	11,782.28
Leon Nunley Coal Co.	10,069.03
Aaron Presnell Coal Co.	17,012.90
F. W. Pryor Coal Co.	22,557.91
Ramsey Coal Co. and G. & E. Ramsey Coal Co.	21,210.40
Horace J. Scisson Coal Co.	37,567.96
Stephenson & Stephenson Coal Co.	23,790.93
J. H. Goforth Coal Co.	23,171.25
Dewey Trussell Coal Co.	15,436.00
Rainbow Coal Corp.	23,345.60
Days Branch Coal Co.	13,143.25
Tennco, Inc.	129,724.40
Paul Gibbs Coal Co.	38,476.80
American Pocahontas Coal Co.	23,660.42
Robin Red Ash Coal Co.	24,337.25
Total	$891,427.16

A detailed description of the foregoing cases is to be found in Appendix A hereto.

[4] All emphasis herein are supplied.

761, Int. Union etc. Workers v. *NLRB*, 6 L. Ed. 2d 592, 596, because "*the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification*". The "*recurrence of the question*" caused this Court to grant certiorari in *International Brotherhood of Teamsters, Local 695, A.F.L.* v. *Vogt, Inc.*, 354 U.S. 284, 287. Again, in granting the writ in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302, "because of the novelty and importance of the principal question", the Court noted that "*The suit also was said to be representative of a number already commenced*" (p. 302, fn. 2).

These cases have applicability and pertinency to the instant petition. Necessarily, the several factors which Petitioners urged in the certiorari petition will persist throughout the trial of each of the thirty-six cases, and the uncertainty, confusion and conflict emphasized by Petitioners in their petition, their reply to the opposition brief, and their supplemental reply will continue to exist until this Court, upon review by certiorari, supplies the requisite juridical guides so that lower federal courts may with definitiveness advise litigants of the true apposite rules.

The effect of this Court's denial of certiorari herein will be a remand of the case to the trial court. Yet, where, as the petition (pp. 12, 16-17) notes, the Fourth Circuit's majority opinion is totally divergent from its previous holding in *Lewis* v. *Mearns*, 4 Cir., 268 F. 2d 427, though the majority opinion is silent thereof, and the Third Circuit is equally divided on the question at issue,[5] and the teaching of this Court is that

[5] See Petitioners' Supplemental Reply To Brief In Opposition for the dissent of *four* Circuit Judges in the Third Circuit's *Lewis* v. *Mears*.

denial of certiorari imports no expression on the merits of the case. *Potts* v. *U. S.*, 361 U.S. 42%, 433, fn. 9[*], the district court's rulings upon such remand are bound to reflect the same uncertainties and confusion of applicable law as do the dissents in the Fourth and Third Circuits. And, the same situation will persist in the trials of each of the enumerated pending cases.[*] Indeed, under the circumstances, a crucial inquiry is, what rule are the district courts to follow? The need for proper judicial guides for utilization in the trials of the pending litigation is an impelling reason Petitioners submit for this Court's granting the review herein sought.

Meanwhile, if such guides are not provided, moneys which this Court proclaimed in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 468, was to provide security for employees in the coal industry and their dependents will be needlessly expended in voluminous litigation. Further, the congressional purpose of authorizing employee welfare and pension plans will be thwarted by such unnecessary expenditure of litigation costs.

CONCLUSION

For the reasons set forth above, and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of

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[*] It is a notable observation that in his opposition brief Lowe does not challenge Trustees' assertion of the existent uncertainties, conflicts and confusion.

Appeals for the Fourth Circuit, as prayed for in said petition.

Respectfully submitted.

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.

Attorneys for Petitioners.

February, 1962.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that said Petition is restricted to grounds specified in Rule 58(2) of this Court's Rules.

HAROLD H. BACON
Of Counsel for Petitioners

APPENDIX A

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. George A. Bryant, et al, individually and trading as George A. Bryant & Sons Coal Co., a partnership	3223	U.S.D.C., E.D. Tenn. Southern Division	$19,946.01	Apr. 17, 1958
Lewis et al v. E. Dick Barrow, individually & trading as E. Dick Barrow Coal Co.	3353	U.S.D.C., E.D. Tenn. Southern Division	$2[illegible]	Jun. 2, 1958
Lewis et al v. Willis Flynn, individually & trading as Willis Flynn Coal Co.	3435	U.S.D.C., E.D. Tenn. Southern Division	$21,350.48	Oct. 28, 1958
Lewis et al v. Howard Higgins, individually & trading as Howard Higgins Coal Co.	3369	U.S.D.C., E.D. Tenn. Southern Division	$12,152.15	Nov. 10, 1958
Lewis et al v. R. B. Ivey, individually & trading as R. B. Ivey Coal Co.	3424	U.S.D.C., E.D. Tenn. Southern Division	$23,082.22	Oct. 28, 1958
Lewis et al v. Will Land, individually & trading as Will Land Coal Co. and or Will Land & Sons Coal Co.	3436	U.S.D.C., E.D. Tenn. Southern Division	$12,302.90	Oct. 31, 1958
Lewis et al v. Charlie Martin, individually & trading as Charlie Martin Coal Co.	485	U.S.D.C., E.D. Tenn. Winchester Division	$33,526.63	Jan. 30, 1959
Lewis et al v. Ewing S. Hampton et al, individually and trading as Patrick & Hampton Coal Co., a partnership	3431	U.S.D.C., E.D. Tenn. Southern Division	$22,457.30	Apr. 21, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. Earl Patton, individually & trading as Earl Patton Coal Co.	3432	U.S.D.C., E.D. Tenn. Southern Division	$41,741.34	Oct. 6, 1958
Lewis et al v. Hampton E. Patton, individually & trading as Hampton E. Patton Coal Co.	3433	U.S.D.C., E.D. Tenn. Southern Division	$18,442.61	Oct. 6, 1958
Lewis et al v. James Patton, individually & trading as James Patton Coal Co.	3438	U.S.D.C., E.D. Tenn. Southern Division	$36,564.30	Dec. 9, 1958
Lewis et al v. J. W. Sanders, individually & trading as J. W. Sanders Coal Co., an individual proprietorship; and J. W. Sanders, et al, individually & trading as J. W. Sanders & Sons Coal Co., a partnership	3437	U.S.D.C., E.D. Tenn. Southern Division	$6,124.48	Nov. 10, 1958
Lewis et al v. J. A. Cordell, individually & trading as J. A. Cordell Coal Co. and/or Cordell Coal & Constr. Co.	492	U.S.D.C., E.D. Tenn. Winchester Division	$11,170.72	Mar. 19, 1959
Lewis et al v. H. A. Daffron, individually & trading as H. A. Daffron Coal Co.	3287	U.S.D.C., E.D. Tenn. Southern Division	$13,692.71	Jul. 16, 1958
Lewis et al v. M. T. Dixon, individually & trading as M. T. Dixon Coal Co.	3361	U.S.D.C., E.D. Tenn. Southern Division	$16,345.40	Oct. 28, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. J. H. Graham, individually & trading as J. H. Graham Coal Co.	3224	U.S.D.C., E.D. Tenn. Southern Division	$12,948.80	Apr. 17, 1958
Lewis et al v. W. T. Morrison et al, individually & trading as M. & T. Coal Co., a partnership	3286	U.S.D.C., E.D. Tenn. Southern Division	$35,898.15	Jul. 16, 1958
Lewis et al v. Marshall Meeks, individually & trading as Marshall Meeks Coal Co.	458	U.S.D.C., E.D. Tenn. Winchester Division	$46,113.36	Oct. 28, 1958
Lewis et al v. W. T. Morrison, individually & trading as W. T. Morrison Coal Co.	3284	U.S.D.C., E.D. Tenn. Southern Division	$21,494.40	Jul. 16, 1958
Lewis et al v. Hershel Myers, individually & trading as Hershel Myers Coal Co.	456	U.S.D.C., E.D. Tenn. Winchester Division	$15,170.12	Oct. 28, 1958
Lewis et al v. Waldo Myers, individually & trading as Waldo Myers Coal Co.	455	U.S.D.C., E.D. Tenn. Winchester Division	$11,737.30	Oct. 28, 1958
Lewis et al v. Edward Nunley, individually & trading as Edward Nunley Coal Co.	486	U.S.D.C., E.D. Tenn. Winchester Division	$11,782.28	Jan. 30, 1959
Lewis et al v. Leon Nunley, individually & trading as Leon Nunley Coal Co.	459	U.S.D.C., E.D. Tenn. Winchester Division	$10,069.03	Oct. 28, 1958
Lewis et al v. Aaron Presnell, individually & trading as Aaron Presnell Coal Co.	3365	U.S.D.C., E.D. Tenn. Southern Division	$17,012.90	Oct. 31, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. F. W. Pryor, individually & trading as F. W. Pryor Coal Co.	3285	U.S.D.C., E.D. Tenn. Southern Division	$22,557.91	Jul. 16, 1958
Lewis et al v. George Ramsey, individually & trading as Ramsey Coal Co., an Individual proprietorship, Monteagle, Tennessee; and George Ramsey et al, Individually & trading as G. & E. Ramsey Coal Co., a partnership	462	U.S.D.C., E.D. Tenn. Winchester Division	$21,210.40	Nov. 10, 1958
Lewis et al v. Horace J. Scissom, individually & trading as Horace J. Scissom Coal Co.	3360	U.S.D.C., E.D. Tenn. Southern Division	$37,457.96	Oct. 28, 1958
Lewis et al v. Howard Stephenson et al, individually & trading as Stephenson & Stephenson Coal Co., a partnership	3362	U.S.D.C., E.D. Tenn. Southern Division	$23,790.93	Oct. 28, 1958
Lewis et al v. J. H. Goforth, individually & trading as J. H. Goforth Coal Co.	3243	U.S.D.C., E.D. Tenn. Southern Division	$23,171.25	May 15, 1958
Lewis et al v. Dewey Trussell, individually & trading as Dewey Trussell Coal Co.	476	U.S.D.C., E.D. Tenn. Winchester Division	$15,436.00	Dec. 9, 1958
Lewis et al v. Rainbow Coal Corp.	628	U.S.D.C., E.D. Ky.	$23,345.60	Sept. 23, 1960

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. Dewey Cook, Jr., individually & trading as Days Branch Darby Coal Co.	1148	U.S.D.C., E.D. Ky.	$13,144.25	Aug. 26, 1961
Lewis et al v. Tenneco, Inc.	3493	U.S.D.C., E.D. Tenn. Northern Division	$129,724.40	Mar. 13, 1958
Lewis et al v. Paul Gibbs, individually & trading as Paul Gibbs Coal Co.	419	U.S.D.C., E.D. Tenn. Winchester Division	$38,476.80	Mar. 6, 1958
Lewis et al v. James O. Large, individually & trading as American Pocahontas Coal Co.	690	U.S.D.C., S.D. W.Va.	$23,660.42	Dec. 27, 1961
Lewis et al v. Robin Red Ash Coal Co., a corporation	695	U.S.D.C., S.D. W.Va.	$24,337.25	Jan. 18, 1962
	Total		$891,427.16	

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